IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class (E-3) **TRYVON M. JONES** United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20210503 USCA Dkt. No. 23-0188/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issue

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S POST INCIDENT BROWSER HISTORY AS RES GESTAE EVIDENCE.

Argument

A. The military judge did not admit the evidence under a consciousness of guilt theory.

The government argued, "Appellant's internet browser history the day after he sexually assaulted, sexually abused, and choked AG was properly admissible as consciousness of guilt evidence." (Appellee Br. 9). This argument deviates from their original trial stance, where they contended the evidence was admissible under the theory of res gestae. (Appellee Br. 12).

This shift introduces a novel argument not presented during trial or considered by the military judge. This kind of appellate argument is only available under an obscure doctrine called "tipsy coachman."[1] However, even under this theory, the judge's ruling can be preserved only if "there is any theory or principle of law *in the record* which would support the ruling." *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010); *See also United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017). There is no indication in the record that consciousness of guilt was a supportable theory. Assuming arguendo this Court were to entertain this rule, under this theory, there is no ground for this Court to uphold the military judge's decision. In such cases, a Circuit Court held, "The record in this case reminds us less of a tipsy coachman arriving at the right destination than of a blind one who ends up at the wrong place." *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1270 (11th Cir. 2008) (declining to apply this Florida principle "known by the delightful title of the 'tipsy coachman' doctrine.").

To accept the government's argument, the Court must make several logical leaps: (1) find that simple internet search terms are indicative of a guilty conscience; (2) find that government counsel proposed the theory despite their explicit proposal under the res gestae theory; and (3) find the military judge

[1] This doctrine is rarely used in Federal Courts and has never been used at CAAF. Out of 526 case results for key word "tipsy coachman" in the Lexis search, 500 of them were from Florida.

understood and admitted the evidence under this theory, despite not making any explicit ruling to that effect.

First, under the government's proposed theory, the evidence must be indicative of guilt. *See e.g.*, *United States v. Clark*, 69 M.J. 438, n.1 (C.A.A.F. 2011) (noting that "demeanor evidence is relevant to an accused's consciousness of guilt only in cases where the inference of guilt is clear."); *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998) (citing threats of witness, making a hand gesture in the shape of a gun, and mouthing the words "you're dead" in the courtroom as examples of consciousness of guilt evidence.) (citations omitted); *United States v. Staton*, 69 M.J. 228, 231 (C.A.A.F. 2010) (holding that an attempt to run over the prosecutor in the parking lot is indicative of "consciousness of guilt.").

The government states, "[I]t is clear the evidence shows appellant searched terms indicative of somebody who committed sexual and aggravated assault crimes the same day he spoke with SSA CW." (Appellee Br. 12). However, appellant's internet searches are more indicative of an ignorant or naïve mind.[2] Contrary to the government's assertion, the evidence here is even less indicative of consciousness of guilt than in *United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019). (Appellee Br. 13). In *Tovarchavez*, the appellant had sent apology texts, which were not considered evidence indicative of guilt. Here, appellant was

[2] It is more likely this was based on appellant's diagnosed personality disorders.

simply inquiring about the allegations and trying to understand what he might be facing. There is no inference of guilt but rather a search for information after being accused.

The government further argues, "the concept is perfectly encapsulated by trial counsel arguing, '[appellant is] looking up things of what he just did. And it goes right to state of mind that this was an assault, that he knew it was an assault, and that he was looking it up.'" (Appellee Br. 12). As previously analyzed, the evidence itself must be indicative of a guilty conscience. Therefore, even had they been more articulate, the trial counsel could not have "perfectly encapsulated the concept." Moreover, unlike appellant, the government was not the one caught off guard by the presentation of this evidence. They had the evidence in their possession for nearly a year. During this time, they had ample opportunity to develop a viable theory of admissibility. Their inability to do so or give notice to resolve the issue *in limine* should not be excused absent good cause.

The government offers no authority for the Court to find government counsel alluded to a principle not explicitly stated. In *United States v. Killion*, this Court noted that "While there are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, *see United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999), of critical importance is the specificity with which

counsel makes the basis for his position known to the military judge." 75 M.J. 209, 214 (citations omitted).

In *Killio*n, the Court found no forfeiture, when appellant requested specific instructions "complete with citation to supporting legal authority," and the military judge "demonstrated his awareness of defense counsel's specific grounds. . . ." *Id*. Here, even if this proposition were to apply to the government, the government's request was far from specific, and there was no indication the military judge was aware of a "consciousness of guilt" theory of admissibility.

In *Clark, Cook,* and *Staton*, this Court held consciousness of guilt was admissible under Mil. R. Evid. 404(b). 69 M.J. at 444; 48 M.J. at 66; 69 M.J. at 230. The government cites *United States v. Quezada*, 82 M.J. 54 (C.A.A.F. 2021) for the proposition that consciousness of guilt evidence is not governed by Mil. R. Evid. 404(b), and therefore, they were absolved of their duty to give notice and meet *Reynolds* factors. However, *Quezada* was not about Mil. R. Evid. 404(b) evidence and the notice issue was not in question because the accused was informed about the evidence's use.

Moreover, *Quezada* does not stand for the proposition that all consciousness of guilt evidence is per se excluded from Mil. R. Evid. 404(b) requirements. *Quezada* is clearly distinguishable because the court was analyzing the propensity issue through a *Hills* analysis. *Id*. at 57 ("Did this instruction violate Appellant's

right to a presumption of innocence under *United States v. Hills*, 75 M.J. 350 (2016)?"). Lastly, the *Quezada* opinion was issued on 20 December 2021 while appellant was tried on 14 September 2021.[3] At the time of the military judge's decision, there was no precedent to suggest that consciousness of guilt is not covered by Mil. R. Evid. 404(b) requirements. Therefore, even if this was consciousness of guilt evidence, it should have been analyzed under the Mil. R. Evid. 404(b) standards, based on the existing law at the time of the trial.

Based on the trial record, the most probable interpretation of the military judge's decision is that she admitted the evidence under a res gestae theory, following the government's explanation. (JA 111). Even under this interpretation, the admission was erroneous because a search term used the day after the alleged event and after government interrogation does not align with the res gestae exception. *See United States v. Clay*, 667 F.3d 689, 698 (6th Cir. 2012)[4] (holding res gestae includes evidence that is "prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of the witness's testimony, or completes the story of

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[3] The other Army case the government cited to support this argument was issued even later in time. (Appellee Br. 14) (citing *United States v. Moore*, 2022 CCA LEXIS 140, at *8–9 (Army Ct. Crim. App. 7 Mar. 2022)).

[4] This court also concluded res gestae evidence is strictly confined to "other acts" with "temporal proximity, causal relationship, or spatial connections" to the charged offense. *Id*.

the charged offense.") (citations omitted); *see also United States v. Veltmann*, 6 F.3d 1483, 1498 (11th Cir. 1993) ("[O]ften arises in trials of conspiracies," res gestae evidence falls outside the scope of Rule 404(b) when it is: "(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." Therefore, the admission was wrongful under both theories.

B. The wrongful admission of error was prejudicial.

In *Quezada*, appellant was on notice since the evidence was on the charge sheet. Moreover, the government in *Quezada* did not use the "false exculpatory evidence" as propensity evidence. 82 M.J. at 56. Here, the government's use of the evidence is not the same. Through use of the search terms, the government aimed to portray appellant as a person of bad character who committed the crime with planning and foresight, even though the search was done after CID questioning. Therefore, the use of the search terms as propensity evidence was highly prejudicial.

The government's interpretation of the sentencing argument that it was not based on the search term evidence is not supported by record. Neither the victim nor appellant, or any other witnesses alluded to knowledge, foresight, or planning for these offenses. (JA 23-78; JA 152). On the contrary, appellant's ignorance and

inability to understand his actions were displayed in his CID statements. (JA 152). The government was only able to argue "how appellant used his position of trust […] to execute the crimes," (Appellee Br. at 17), because of this evidence, since they told the military judge "he [appellant] knew" what he was doing, (JA 111). There is no other evidence that could be used for this supposed "knowing evil" characterization. Because the government was not constrained by the guardrails of Mil. R. Evid. 404(b), they freely argued propensity.

Finally, the military judge's opinion of the appellant after the sentencing argument was evident when she wrote "HORRIBLE!" in her notebook and showed it to the parties after the trial. Therefore, the government's contention that the evidence did not influence the military judge's findings and sentencing is false.

Conclusion

WHEREFORE, Appellant respectfully requests this Court vacate the findings and sentence.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 1,944 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Defense Appellate Division and the Government Appellate Division on October 24, 2023.

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